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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 834

In the Matter of

JACOB A. MILLSTEIN,

Petitioner,

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

Petitioner prays for the issuance of a writ of certiorari to review the order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered March 10, 1966, disbarring petitioner from practice as an attorney and counselor-at-law.

Opinions Below

The memorandum opinion of the Appellate Division ordering petitioner's disbarment is reported as *Matter of Jacob A. Millstein* in 25 A. D. 2d 129 (1st Dept. 1966). Petitioner moved in the Court of Appeals for leave to appeal on certain non-constitutional issues, which motion was denied on July 7, 1966, —— N. Y. 2d ——. Petitioner also moved in the Court of Appeals for leave to appeal on stated constitutional issues. This application was denied on September 22, 1966 on the ground that the constitutional questions presented were not substantial, —— N. Y. 2d ——.

Jurisdiction

This Court's jurisdiction rests on 28 U. S. C. §1257(3).

Statement of the Case

1. *The Facts and Proceedings Below*

A petition charging the petitioner with professional misconduct was served upon him on March 29, 1963 by the Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York, New York County Lawyers' Association and the Bronx County Bar Association, respondent herein. Petitioner's answer was served upon respondent on May 1, 1963, after which the Appellate Division, by order of May 16, 1963, appointed a referee to hear the evidence and report thereon to the Court.

On August 26, 1963, petitioner served upon respondent motion papers in connection with his application for an order granting discovery and inspection of all testimony, statements and exhibits in respondent's possession. The Appellate Division, on October 3, 1963, unanimously denied petitioner's application.

Petitioner then served upon respondent, on October 28, 1963, a notice of motion returnable in the Appellate Division for an order granting leave to reargue, or in the alternative, for leave to appeal to the Court of Appeals, which was unanimously denied by order of November 19, 1963.

Thereafter, petitioner's application for leave to appeal to the Court of Appeals was denied by that Court on January 9, 1964.

Petitioner's petition for writ of certiorari was denied by this Court on May 18, 1964, 377 U. S. 833.

All of the above proceedings took place prior to commencement of hearings before the referee on November 9, 1964. Respondent completed its case on February 10, 1965. On February 15, 1965, petitioner served respondent with an order to show cause in the Appellate Division, which sought the disclosure by respondent of all statements, testimony and documents in respondent's possession not already disclosed, and relating to one Dansker, one Sapot and the petitioner. The application was referred to the entire Bench, whereupon the Appellate Division, on March 18, 1965, unanimously denied the application.

Petitioner then moved in the Appellate Division for reargument or for leave to appeal to the Court of Appeals, with a stay of proceedings pending disposition, all of which was denied by order of April 13, 1965.

Prior to completion of his case before the referee on April 22, 1965, petitioner had appealed to the Court of Appeals from the Appellate Division's order of March 18, 1965. The Court of Appeals denied this application by its order of May 20, 1965. Incidental to his Court of Appeals motion, the petitioner, on April 29, 1965, applied to Honorable Stanley H. Fuld for a stay of any further disciplinary proceedings. Judge Fuld, after hearing arguments from both petitioner and respondent, refused to stay the proceedings.

Petitioner returned to this Court with a second application for writ of certiorari, which was again denied, 382 U. S. 902.

By his report* to the Appellate Division, dated August 31, 1965, the referee sustained a number of charges, including that which alleged petitioner's initiation and implementation of a corrupt conspiracy to solicit claims for personal injuries. This charge, among others, formed the basis of the Appellate Division's opinion which accompanied its order disbarring the petitioner (*supra*).

The petitioner's motions in the Appellate Division for reargument and for leave to appeal to the Court of Appeals and his application in the latter Court on both constitutional and non-constitutional grounds were denied as detailed above.

With the instant application, petitioner has been before this Court three times with the same demand. His first petition was addressed to the Court before the hearings were

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* The details of this report as well as the substance of motions, supporting papers, briefs in opposition, Court orders, etc. are contained in the certified record submitted with the petition herein.

commenced. His second application was made upon completion of the hearings, but prior to a final disposition of the formal charges by the Appellate Division. The Appellate Division having finally determined the issue with its order of disbarment, petitioner herein renews his plea.

2. *The Creation of the Co-ordinating Committee and Its Purpose*

The Co-ordinating Committee on Discipline was established in 1958 by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department. The Committee's continuing operation responds to an apparent need for a systematic examination of the practices of attorneys who specialize in personal injury cases.

For many years prior to 1958, prosecutors in the counties of New York City from time to time had investigated and prosecuted attorneys and those associated with them in the handling of such cases, for unlawful solicitation and for the violation of other sections of the Penal Law. These sporadic efforts had only a limited effect on the undesirable practices which were coming to be all too commonplace in the area of contingent fee practice.

On February 3, 1959, the Appellate Division, pursuant to the provisions of Section 90 of the Judiciary Law and in the exercise of its inherent powers, ordered the Co-ordinating Committee to conduct:

> "... a continuous examination and study of the Statements of Retainer and Closing Statements filed with the Appellate Division in the First Judicial Department, pursuant to the applicable rules of this Court, for the following purposes: 1. Compilation and interpretation of relevant statistics and data; 2. Observa-

tion, consideration and, where necessary, correction of the professional conduct of attorneys and those employed by them or associated with them in any manner whatever in representing either plaintiffs or defendants or their indemnitors, insurers, subrogors, or subrogees in those actions in which such statements are required to be filed by the rules of the court . . ."

The Committee has full subpoena powers and, in addition, all pertinent records, papers and documents filed in the Appellate Division are available to it for the purpose of its examination and study. Since the establishment of the Judicial Conference of the State of New York as the Court's chief administrative agency, pertinent records filed with that agency are also made available to the Committee.

The Issue Presented

In denying petitioner's demand for inspection of prior statements and documents having no relation to nor bearing upon the testimony of witnesses who actually testified before the referee, did respondent (and in effect, the Courts of the State of New York in supporting respondent's position) deny petitioner his right to due process under the 14th Amendment to the Constitution of the United States?

ARGUMENT

POINT I

Under prevailing Federal and State law, respondent properly refused to produce for petitioner's inspection sworn statements given by persons who appeared during respondent's preliminary inquiry, but who did not testify before the referee.

It is well established that a defendant in a criminal case has the right to the production for inspection of documents, reports, prior statements and the like in the possession of a prosecutor when these specific documents contain statements from persons offered by the prosecution as witnesses at the trial.

This Court, in *Jencks* v. *United States*, 353 U. S. 657, 667, reiterated the necessary elements which determine the accused's right to inspect such material:

> "The necessary essential of a foundation . . . and present here, are that '[t]he demand was for production of . . . *specific documents and did not propose any broad or blind fishing expedition* among documents possessed by the Government on the chance that something impeaching might turn up. Nor was this a demand for statements taken from persons or informants not offered as witnesses.' (Emphasis added by the Court.) [Citing *Gordon* v. *United States*, 344 U. S. 414, 419.] We affirm and re-emphasize these essentials. 'For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule . . .' 344 U. S. at 420."

Following *Jencks,* Congress enacted 18 U. S. C. §3500 entitled "Demands for production of statements and reports of witnesses." There follow relevant portions of this statute, known as the Jencks Act:

> "(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case. (b) After a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Court shall order it to be delivered directly to the defendant for his examination and use . . ."

In New York, the Court of Appeals enunciated this State's rule of disclosure in criminal cases when it held that the defense is entitled to examine a witness' prior statement whether or not it varies from his testimony on the stand, *People* v. *Rosario,* 9 N. Y. 2d 286. The Court of Appeals, in language similar to that used by this Court in postulating the *Jencks* rule, further stated:

> "It does not mean that the defense will be able to go on a tour of investigation seeking general useful in-

formation. *Our decision presupposes that the statement relates to the subject matter of the witness' testimony, that it is to be used for impeachment purposes* only after direct examination." (Emphasis supplied.) 9 N. Y. 2d at 290.

See also: *People* v. *Malinsky,* 15 N. Y. 2d 86, which reaffirms the *Rosario* rule, and *People* v. *Pizarro,* 15 N. Y. 2d 803, in which it was held that the defense is entitled to the Grand Jury minutes of testimony by the People's witnesses who testify at trial.

Petitioner has quoted liberally from the recent dissent of Hon. Stanley Fuld of the Court of Appeals in the case of *People* v. *Fein,* 18 N. Y. 2d 162, 272 N. Y. S. 2d 753, a portion of which appears in the petition (14*) as follows:

"The prosecution is not privileged to decide for the court what is admissable or for the defense what is useful." (Citation)

The complete paragraph from which petitioner has extracted the above sentence reads (citations omitted) as follows:

"The concept of fairness, of due process, imposes upon the prosecution a duty to apprise the defense of evidence favorable to the accused, *particularly when such evidence contradicts the testimony given by the People's witnesses in open court* . . . This duty persists even though the defense might, by dint of a little more effort, have independently uncovered the evidence in question and even though the district at-

* Parenthetic numerical references are to the petitioner's brief in the instant application.

torney regards it as lacking in probative force or worthless . . . The prosecution is not privileged 'to decide for the court what is admissable or for the defense what is useful'." (Emphasis supplied.)

Respondent has scrupulously complied with the rule of disclosure as set forth in *Rosario.** Petitioner was confronted with the witnesses who testified against him and was given the fullest opportunity to cross-examine such witnesses. After each witness upon direct examination completed his testimony, the respondent provided petitioner with a transcript of the witness' testimony in the preliminary inquiry together with all pertinent exhibits, notes and other relevant material.

Petitioner is not content with the remedies which both state and federal law afford him. He demands not the statements of witnesses who testified at trial, but rather the statements of "any other witnesses who . . . were heard by respondent *in camera* and not called (before the referee)" (11). Respondent urges that petitioner is not entitled to this revolutionary relief, either under federal (*Jencks*) or state (*Rosario*) law.

The weakness of petitioner's position is obvious when it is noted that he failed to call to the stand witnesses who were just as much within his control as they were within the control of respondent. Petitioner had prior relationships with the witnesses who appeared before respondent in the preliminary proceeding, and he knew who these witnesses were. A statement given by one Holt, an

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* Respondent follows the *Rosario* Rule even though it has never contended that a disciplinary proceeding is criminal in nature—see Respondent's Briefs in this Court, No. 455, October, 1965 and No. 970, October, 1963.

attorney, who did not testify before the referee, is one of the items petitioner refers to in his brief (11). Holt, a former associate of petitioner, was certainly available to petitioner if his testimony was thought to be relevant. Petitioner's failure to call Holt and others can only be attributed to his own analysis of their relevancy to the proceeding. Did Holt have material testimony to offer in this proceeding? The answer quite clearly is, he did not.

Nevertheless, petitioner stands before this Court and demands the statement of Holt (among others) given before the respondent in the preliminary inquiry, notwithstanding the fact that Holt never testified before the referee and notwithstanding the fact that he, the petitioner, could have called this same Holt at any time to determine whether or not Holt had relevant testimony to offer.

The law which petitioner cites in his brief fails to support his contentions.

In *Brady* v. *State of Maryland*, 373 U. S. 83, this Court held that the suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

If petitioner is charging that respondent has suppressed evidence favorable to him, let him so state with supporting facts. His failure to do so in the many applications made to this Court as well as to the Appellate Division and the Court of Appeals can only indicate that there is no suppression issue before this tribunal.

Petitioner cites *Smith* v. *Pennsylvania*, 376 U. S. 354, which is also irrelevant. In *Smith*, the petitioner had re-

quested, and was denied, access to statements taken from two *witnesses* for the State, which statements petitioner said he needed for impeachment purposes. This Court held that petitioner was entitled to the statements,

Here, petitioner demands not the sworn statements of witnesses who testified at trial, but rather the statements of those who did *not* testify at trial. This posture, taken to its extreme in the area of criminal law, would result in holding that a defendant accused of committing a crime is entitled to the testimony of all witnesses who appeared before the Grand Jury, whether or not they testified at trial. This is without doubt not the law today, *People* v. *Pizarro, supra.*

In *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96, this Court held that the requirements of due process must be met before a State can exclude a person from the practice of law. The petitioner was entitled to notice of, and a hearing on, the grounds for his rejection, either before the Committee or before the Appellate Division.

In the instant case, all of the procedural requirements outlined in *Willner* were fully complied with by respondent.

Petitioner urges that he is entitled to the universal disclosure demanded, since such relief is available to even "the meanest souled suitors and lowliest criminals" (15). The remedies of disclosure and inspection available to the accused criminal in both the federal and New York courts have been set forth above. It is patently clear that petitioner's demands are far beyond the scope of prevailing law.

POINT II

The issue relating to the scope of C. P. L. R. §3101 does not meet this Court's requirements for reviewability.

The only issue presented is whether the Court of Appeals of the State of New York correctly construed and applied a State statute, Section 3101 of the New York Civil Practice Law and Rules. No question of the constitutionality of Section 3101 was raised below or is sought to be raised in this Court. Thus it is clear that the judgment of the Court of Appeals on this issue does not meet the requirements for reviewability set forth in 28 U. S. C. §1257(3), the pertinent portion of which limits review of State court judgments by way of certiorari to cases ". . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States . . ." The scope of Section 3101 is an issue solely of the proper construction of a State statute the validity of which is not drawn in question. Petitioner has not only failed to meet his burden of showing the issue to be of sufficient importance or widespread application in the administration of justice to suggest the appropriateness of review by way of certiorari; he has not even adduced a jurisdictional theory on which the writ could conceivably be granted.

CONCLUSION

The petition for writ of certiorari should be denied.

December, 1966

Respectfully submitted,

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